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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )

Closed Captioning and Video )  
Description of Video Programming )

Implementation of Section 305 of the )  
Telecommunications Act of 1996 )

Video Programming Accessibility )

MM Docket No. 95-176

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APR 1 1997

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**REPLY COMMENTS OF THE  
SMALL CABLE BUSINESS ASSOCIATION**

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## **SUMMARY**

The record in this rulemaking currently contains little information concerning the adverse impact of the proposed closed captioning rules on small cable. To help fill this critical gap, SCBA files these reply comments.

In other proceedings, the Commission has developed a substantial record concerning the disparate costs and burdens of regulatory compliance on small cable. The Commission has made adjustments to its rules to accommodate small cable. To avoid imposing undue burdens on small cable in this rulemaking, the Commission must adopt provisions that reflect the higher per subscriber costs of closed captioning and compliance faced by small cable.

Specifically, SCBA proposes the following provision to ameliorate undue burdens on small cable:

1. Place compilations obligations on programming producers and owners.
2. Exempt small cable operators from any compliance obligations.
3. Adopt streamlined compliance procedures for small cable systems including:
  - a. Permitting qualifying small systems to rely on programmer certifications of compliance.
  - b. Shifting the burden of proof to the complainant when programmer certifications show compliance.
4. Adopt streamlined, low-cost waiver procedures for small systems.
5. Exempt PEG programming.
6. Exempt LO programming.

By adopting these provisions, the Commission will minimize unnecessary regulatory burdens on small cable, consistent with the goals of Section 713.

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**REPLY COMMENTS OF THE  
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**I. INTRODUCTION**

The record in this rulemaking currently contains little information concerning the adverse impact of the proposed closed captioning rules on small cable. To help fill this critical gap, SCBA files these reply comments to the *Notice*.<sup>1</sup> SCBA also files separate reply comments addressing the Initial Regulatory Flexibility Analysis.

Without appropriate small cable provisions, mandatory closed captioning could saddle small cable operators with excessively high per subscriber compliance costs. Closed captioning costs and the costs of compliance represent fixed costs. Small cable operators and small cable systems have insufficient subscriber bases over which to spread these costs. This makes compliance with the proposed requirements economically impossible. The Commission has

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<sup>1</sup> *Notice of Proposed Rulemaking*, MM Docket No. 95-176, FCC 97-4, (released January 17, 1997) ("*Notice*").

developed a substantial record concerning small cable's predicament and has made appropriate adjustments to its rules in other rulemakings.<sup>2</sup> As elsewhere, small cable needs carefully tailored exemptions, waiver procedures and recordkeeping relief.

SCBA currently speaks for over 280 independent cable operators. Since its beginning in May 1993, SCBA has participated in many Commission rulemakings, making consistent contributions to the Commission's development of appropriate regulatory provisions for small systems and small operators. In these reply comments, SCBA proposes specific adjustments to the closed captioning requirements and procedures that will accommodate the high per subscriber costs of compliance for small cable. These adjustments will allow small cable to assist in fulfilling the statutory requirements without undue burdens and will preserve small cable's ability to provide local origination and PEG programming.

## **II. KEY CONCERNS OF SMALL CABLE**

SCBA has four key concerns with the proposed closed captioning rules:

- Small cable will bear closed captioning compliance burdens but, unlike larger programming distributors, will not have the leverage to require compliance from programmers.
- Small cable will bear closed captioning compliance burdens but cannot absorb the high per subscriber cost of captioning PEG and local origination programming. PEG and LO programming are critical public services provided by many small systems; mandatory closed captioning will require the elimination of many of these services.
- Many small systems will find it financially impossible to access the waiver process if required to initiate a formal petition for special relief proceeding.

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<sup>2</sup> *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266, 93-215, FCC 95-196 (released June 5, 1995) ("*Small System Order*"); *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, CS Docket No. 96-60, FCC 97-27 (released February 4, 1997) ("*Leased Access Reconsideration*").

- Small cable systems require continued relief from administrative and recordkeeping burdens. Truly small operators should receive an exemption as a class.

The Commission may address these concerns through pragmatic adjustments to its rules and remain well within its authority under Section 713. Congress specifically granted the Commission authority to tailor its rules to avoid imposing unaffordable burdens on small providers. The Regulatory Flexibility Act also requires the Commission to consider means to minimize regulatory burdens on small entities. SCBA proposes below specific rules and procedures that will help small cable to facilitate access to programming by the hearing impaired, while easing undue burdens that would otherwise result.

### **III. PROPOSED SMALL CABLE RULES**

#### **A. The Commission should place the compliance obligations on programming producers and owners.**

Congress and the Commission recognize that programming producers and owners will serve as the least-cost providers of closed captioning.<sup>3</sup> Despite this conclusion, the *Notice* seeks to place compliance burdens on programming providers, including small cable. This compares to enforcing air quality standards by citing drivers rather than automakers, an inefficient compliance mechanism that would increase driving costs rather than improve emission quality. This tentative regulatory scheme imposes several layers of transaction costs on the process, wasting resources that could be better spent on increasing closed captioning and keeping cable rates down.

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<sup>3</sup> H.R. Report 104-204, 104th Cong., 1st Sess. at 114 ("It is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program."); Notice ¶¶ 6, 27.

For these broad reasons, SCBA supports the many commenters who ask the Commission to place the compliance obligations on programming producers and owners.<sup>4</sup> Relying on cable operators to "provide the incentive to caption" imposes unnecessary transaction costs between the statute and its implementation. This will also impose unique undue burdens on small cable. The *Notice* does not consider this.

The Commission explains its proposed allocation of compliance burdens as follows:

We believe that the programming providers are in the best position to ensure that the programming they distribute is closed captioned because of their role in the purchasing of programming from providers. For example, a provider can refuse to purchase programming that is not closed captioned.

\* \* \*

[W]e anticipate that our rules will result in video programming providers incorporating such requirements into their contracts with video producers and owners, regardless of which party has the obligation to comply with our rules. . . . We seek comment on whether there are any anomalous situations created by our proposal to place the responsibility for compliance with our closed captioning rules on video programming providers.<sup>5</sup>

Small cable and other small providers present a class of "anomalous situations" that require adjustments to the Commission's rules.

The *Notice* assumes that programming providers have leverage to demand captioning as consideration for carriage. For large programming providers, this may apply.<sup>6</sup> Cable networks, broadcast programming, national news programming and other types of programming require distribution by large programming providers - cable, DBS, broadcast and others - to

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<sup>4</sup> Ameritech New Media Comments, p.5; GTE Comments, p.2; SBC Comments, p. 4; U.S. West Comments, p.9.

<sup>5</sup>*Notice*, ¶¶ 28, 30.

<sup>6</sup> NCTA Comments, p. 33.

survive. Large programming providers can incorporate such requirements into contracts and expect agreement.

Not so for small cable. Small cable continues to struggle against substantial programming producers and owners who refuse to negotiate fairly with small cable and refuse to deal with the National Cable Television Cooperative.<sup>7</sup> Moreover, these programmers supply the popular programming that subscribers demand and that small cable must carry to compete with DBS, MMDS and other providers. Consequently, small cable is squeezed. No genuine choice exists to not carry such programming.<sup>8</sup>

As a result, the Commission's analysis concerning programming providers' power to require captioning by contract does not apply to small cable operators. The record shows that small broadcasters pose a similar anomaly.<sup>9</sup>

The Commission has a well-developed record showing that small cable faces disparate regulatory burdens and higher cost structures than larger systems.<sup>10</sup> Based on its analysis of small systems, the Commission has ample information to conclude that small cable operators cannot incur the high per subscriber cost of captioning programming.

The Commission can resolve this anomaly by one of several means. Several commenters

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<sup>7</sup> See, e.g. SCBA Petition to Deny, In re: The Walt Disney Company and Capital Cities/ABC, Inc., BTCCT-950823KF-LJ, filed September 27, 1995 (discussing impact on small cable of vertically integrated programmers that refuse to deal with NCTC).

<sup>8</sup> Even giant Ameritech recognizes this. Ameritech New Media Comments, p. 10 ("It is unrealistic to think that a provider, especially a small CATV operator, could simply refuse to carry popular programming that the owner refuses to caption.").

<sup>9</sup> Comments of the Association of America's Public Television stations and the Public Broadcasting Service, p. 11.

<sup>10</sup> *Small System Order*, ¶¶ 6, 27, 53, 55, 56.



suggest the most straightforward proposal - place the compliance burden on the most efficient source of captioning, programming producers and owners. This will lower the ultimate costs of captioning by eliminating transaction costs of negotiating captioning issues between providers and producers. This will also most broadly spread the costs of captioning to all consumers of programming and not disproportionately shift costs to smaller programming providers and their customers. This will also ensure the broadest dissemination of non-exempt captioned programming, and fulfilling the mandate of Section 713.

If the Commission does not place the compliance burden on programming producers and owners, then small cable requires additional adjustments to the proposed rules to reflect the undue economic burdens of captioning and small cable's lack of market power to require captioning by programmers.

**B. The Commission should exempt as a class small cable operators serving 1,000 or fewer subscribers.**

If the Commission maintains placing compliance burdens on programming providers, it should establish an exemption for small cable operators. The *Notice* recognizes the Commission has authority to do so.<sup>11</sup> The Commission considered an exemption for small providers, but initially concluded that it was unnecessary. "All classes of providers appear to have the technical capability to deliver closed captioning to viewers intact."<sup>12</sup> For truly small systems, the issue is not the technical ability to transmit captioned programming - all systems have that capability. The issue is the financial ability to bear the costs of any mandatory captioning along

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<sup>11</sup> *Notice*, ¶ 85.

<sup>12</sup> *Id.*

with the administrative burdens of compliance, recordkeeping, and defending complaints.

The Commission cannot reasonably establish a regulatory scheme that could require small cable operators and their customers to pay for any closed captioning. As the *Notice* indicates, captioning costs range between about \$300 and \$2500 per programming hour.<sup>13</sup> For a 1,000 subscriber system to caption even one hour of programming would impose a cost of between \$0.30 and \$2.50 per hour per subscriber. That is for a single hour on a single channel. If a small cable operator were required to caption even 10 hours of programming per month to meet compliance thresholds, this would cost between \$3.00 and \$25.00 per subscriber per month. The Commission has already recognized that for regulated small systems, a rate of \$1.24 per channel per month is the presumed reasonable maximum permissible rate, without a special showing.<sup>14</sup> Even minor captioning requirements could, at a minimum, triple this rate to cover captioning costs alone.

SCBA believes that the Commission does not intend this anomalous result. The *Notice*, however, did not consider the consequences of even minimal captioning compliance burdens on small cable. Consideration of the high per subscriber costs of providing captioning shows that an exemption for truly small operators is warranted to relieve the patently undue burdens that class of providers would otherwise bear.

In addition to the costs of providing even minimal captioning, a small operator exemption will relieve small operators from the administrative burdens and costs of record retention and defending against complaints. Most small operators are family-run businesses with rarely more

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<sup>13</sup> *Notice*, ¶ 18-22.

<sup>14</sup> *Small System Order*, ¶ 54.

than one full-time non-family employee. As the Commission has recognized, the administrative burdens of cable regulation had fallen too heavily on these small businesses, and substantial relief is appropriate.<sup>15</sup> This policy applies directly to this rulemaking as well.

Establishing a class exemption for 1,000 subscribers and below systems will protect truly small systems. This 1,000 subscriber threshold aligns with other small operator relief established by the Commission.<sup>16</sup> As the *Notice* recognizes, customers served by these systems will still receive a substantial amount of captioned programming, an amount that will continue to increase as programming producers and owners respond to the closed captioning rules.<sup>17</sup> Consequently, an exemption for small operators will serve both the statutory mandate to make video programming fully accessible while exempting a class of providers for whom mandatory captioning would impose excessive economic burdens.

**C. The Commission should adopt streamlined compliance procedures and waiver procedures for systems serving 15,000 subscribers or less.**

For small systems serving 15,000 subscribers or less,<sup>18</sup> the Commission should adopt streamlined compliance and waiver procedures. Streamlined compliance procedures, similar to small system rate regulation relief, will ease the disparate per subscriber cost of compliance that small systems would face. Streamlined waiver procedures will allow qualifying small systems

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<sup>15</sup> *Id.*, ¶¶ 55 and 56; *Leased Access Reconsideration Order*, ¶ 130.

<sup>16</sup> See, e.g. 47 C.F.R. § 76.95 (network non-duplication exemption); 47 C.F.R. § 76.156 (syndicated exclusivity exemption).

<sup>17</sup> *Notice*, ¶¶ 12-17, discussing substantial percentages of programming that is currently captioned.

<sup>18</sup> The Commission has already determined that small system financial and administrative burdens warrant regulatory relief. *Small System Order*, ¶ 53; *Leased Access Reconsideration*; ¶¶ 130, 134.

to seek individual waivers or exemptions at a lower cost than existing special relief procedures.

**1. Compliance procedures.**

Qualifying small systems should be permitted to obtain and rely upon statements of compliance from programming providers. If a complaint is filed against the small system, it can respond by submitting to the complainant and the Commission the statements of compliance and other information that establishes whether the small system has met the applicable percentage threshold. If the statements of compliance from programmers and other information show that the small system meets or exceeds the closed captioning standard, then the burden of proof should shift to the complainant to establish a violation of the Commission's rules.

This compliance mechanism minimizes operational regulatory burdens on small systems and focuses compliance efforts on cases of alleged violations. Establishing compliance with statements of compliance from programmers and other information and shifting the burden of proof to the complainant aligns with the small system rate regulation procedures.<sup>19</sup> The Commission adopted small system rate regulation procedures for the identical reasons that SCBA advocates these procedures here - to reduce the disparate burdens of cable regulation on small systems.

**2. Waiver procedures.**

Concerning procedures for individual waivers or exemptions, the Commission should establish streamlined, low-cost procedures for qualifying small systems. The Commission should allow small systems to submit, in letter form, their reasons for seeking relief from the closed captioning rules. The rules should permit small systems to present all arguments and

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<sup>19</sup> 47 C.F.R. § 76.934(h)(5)(i).

information that they feel justifies relief. The Commission would then put the waiver requests on public notice, allowing interested parties to participate. The cable operator would then have an opportunity to reply to any oppositions. Qualifying small systems should also not be required to pay the nearly \$1000 filing fee for submitting a petition for special relief.

These streamlined, less formal procedures will allow small systems to seek waivers or exemptions at a lower cost in terms of attorney fees and filing fees. In the context of small system rate regulation, several SCBA members with systems falling outside of the Commission's size quotas have declined seeking small system status due the cost of a full-blown petition for special relief proceeding. These adjustments to the Commission's procedures will help systems that face undue compliance burdens to more readily access relief procedures.

#### **IV. THE COMMISSION SHOULD EXEMPT PEG PROGRAMMING.**

SCBA supports the programming providers and municipalities that seek an exemption for PEG programming. Many commenters describe how even minimal mandatory captioning would exceed PEG access budgets.<sup>20</sup> These comments provide ample support for a class exemption permitted by the statute. SCBA adds two additional small cable concerns that militate against mandatory captioning on PEG programming.

First, PEG programming represents a critical public service that small cable operators can provide their community. National DBS and MMDS providers cannot or do not provide

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<sup>20</sup> Kansas City Comments, p. 2-5; Tualatin Valley Community Access Comments, p. 1; Hoike: Kauai Community Television, Inc., p. 1; Lathrup Village Comments, p. 1; Kalamazoo Community Access Center Comments, p. 1; Ameritech New Media Comments, p. 16; Roman Catholic Diocese of Rockville Centre Comments, p. 4; U.S. West Comments, p. 5; Chicago Access Corp. Comments, p. 2; Plymouth Community Channel 3 Comments, p. 1; Westbound Community Access Television, Inc. Comments, p. 2; SNCT Comments, p. 2; Southwest Suburban Cable Commission Comments, p. 2.

such services. As explained by numerous municipal commenters, mandatory captioning will result in substantially reducing or even eliminating PEG programming. This will have a severe adverse impact on small cable's ability to serve the public interest in diverse, local PEG programming.

Second, for those municipalities that seek to continue providing captioned PEG programming, the costs will ultimately be borne by the small system and its subscribers. PEG support is a heavily negotiated item in most franchise renewals, and municipalities look to cable operators and their customers to pay for PEG. SCBA members readily contribute to this service when it can provide services that subscribers and municipalities seek at a reasonable price. When captioning costs of \$300 to \$2500 per hour are added to other PEG support, the high per subscriber cost will require most small systems to cease PEG programming.

#### **V. THE COMMISSION SHOULD EXEMPT LOCAL ORIGINATION PROGRAMMING.**

SCBA supports the commenters that seek an exemption for LO programming as a class.<sup>21</sup> Even more so than PEG programming, cable operators and LO programmers produce LO programming on extremely lean budgets. As SCBA members and other small operators recently explained to Cable Service Bureau officials, imposition of mandatory closed captioning will shut down LO programming in their franchise areas.<sup>22</sup> Many smaller communities will lose a vital source of local news, entertainment and information.

LO programming also presents a critical public service provided by small cable. The

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<sup>21</sup> Time Warner Cable Comments; NCTA Comments, p. 24; U.S. West Comments, p. 3.

<sup>22</sup> NCTA Small System Forum, March 18, 1997, New Orleans.

ability to provide LO at a reasonable cost permits small cable to offer a unique service that national DBS and MMDS operators cannot or do not offer. In this way, small cable provides a vital medium for diverse programming that directly addresses local interests. An exemption for LO programming will avoid the undue burdens that would eliminate such programming in small markets. In addition, the exemption will serve the substantial public interest in diverse local programming.

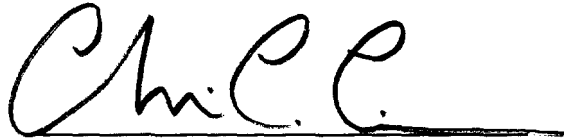
## **VI. CONCLUSION**

Section 713 and the Regulatory Flexibility Act empower the Commission to make adjustments to the closed captioning rules to avoid undue burdens of compliance and to minimize regulatory burdens on small cable. The Commission has a well-developed record concerning the need for small cable regulatory provisions. In this proceeding, SCBA requests that the Commission make the following adjustments to its rules:

1. Place compliance obligations on programming producers and owners.
2. Exempt small cable operators from any compliance obligations.
3. Adopt streamlined compliance procedures for small cable systems including:
  - a. Permitting qualifying small systems to rely on programmer certifications of compliance.
  - b. Shifting the burden of proof to the complainant when programmer certifications show compliance.
4. Adopt streamlined, low-cost waiver procedures for small systems.
5. Exempt PEG programming.
6. Exempt LO programming.

By adopting these provisions, the Commission will minimize unnecessary regulatory burdens on small cable consistent with the goals of Section 713.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric E. Breisach", written over a horizontal line.

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